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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTHUR LEE SMART,

Defendant and Appellant.

B229216

(Los Angeles County
Super. Ct. No. YA074204)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Steven R. Van Sicklen, Judge. Affirmed.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Scott A. Taryle and Eric J. Kohm, Deputy Attorneys General,
for Plaintiff and Respondent.

INTRODUCTION

Arthur Lee Smart appeals from a judgment of 516 years to life for multiple second degree robberies, attempting to dissuade a witness, assault with a firearm, and possession of a firearm by an ex-felon. He contends (1) his confrontation clause rights were violated, (2) the trial court erred in giving a modified jury instruction, (3) the court abused its discretion in denying a continuance on his motion for a new trial, and (4) the court failed to make an informed sentencing choice. Finding no error, we affirm.

STATEMENT OF THE CASE

A jury found appellant guilty of 12 counts of second-degree robbery (Pen. Code, § 211),¹ one count of attempting to dissuade a witness (§ 136.1, subd. (a)(2)), one count of assault with a semi-automatic firearm (§ 245, subd. (b)), and one count of possession of a firearm by an ex-felon (§ 12021, subd. (a)(1)). The jury also found true firearm enhancement allegations as to four of the robbery counts.

After the guilty verdicts, the trial court set a date for a sentencing hearing. The sentencing hearing was continued four times before appellant filed a motion for a new trial. In the motion, appellant contended he received an unfair trial because Detective Celeste Coates impermissibly testified that the shoes found in appellant's house matched the shoes depicted in the videotape recording of one of the robberies. After granting another continuance, the trial court heard and denied the motion for a new trial.

Appellant then requested to represent himself, and asked for a continuance to better prepare for the sentencing hearing. The court stated that it was not

¹ All further statutory citations are to the Penal Code, unless otherwise stated.

continuing the sentencing hearing, and it denied appellant's request to represent himself as untimely. Appellant waived his right to a jury trial on his prior convictions, and admitted he had suffered three prior "strikes" (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court found true that appellant had suffered three prior convictions under section 667, subdivision (a)(1) and one prior conviction under section 667.5, subdivision (b). The court denied appellant's oral *Romero* motion,² and sentenced appellant to an aggregate term of 516 years to life. Appellant timely appealed.

STATEMENT OF THE FACTS

A. *The Prosecution Case*

The allegations against appellant arose from five separate robberies. Appellant was identified as the robber in each incident. The factual circumstances of each robbery and the subsequent police investigations were as follows:

1. Los Angeles McDonald's Restaurant Robbery

On December 23, 2008, at around 11:00 a.m., a man armed with a gun robbed a McDonald's restaurant located in Los Angeles. The robber took between \$200 to \$300 from the cash registers before fleeing. The robbery was recorded on videotape, and the recording was played for the jury.

Efrem Tucker, the restaurant manager, described the robber as an African-American male wearing gray sweatpants, white tennis shoes, a gray hoodie jacket, white gloves, and a white mask. According to Tucker, the mask was made of cloth and had holes cut out for the robber's eyes. Tucker estimated that the robber was about six feet, two inches tall and weighed about 280 pounds. He also described the gun as silver and black, and told the police that it was a chrome semi-automatic

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

handgun. Because of the mask, Tucker never saw the robber's face. At trial, Tucker stated that appellant was the same height and weight as the robber, and also had the same body and face shape. He also testified that a mask recovered by the police looked similar to the one the robber wore.

Nicole Hawley, an employee, described the robber as a Black male who was between five feet, nine inches to six feet tall, and weighed about 260 pounds. The robber was wearing a dark pullover hoodie with pockets, jeans, tennis shoes, and a white "t-shirt mask." Hawley believed that appellant had the same body shape as the robber.

Ranulfo Avancena, another employee, described the robber as a male who was taller than five feet, nine inches, and maybe around six feet tall. The robber wore a long-sleeved jacket with a zipper and light-colored hood, light-colored gloves, a light-colored mask, and sneakers. The mask was made of cloth and had two eyeholes in it. The robber was wielding a silver gun. According to Avancena, appellant matched the same general description of the robber, particularly in height and build.

A third employee, Obdula Aguirre, described the robber as a "really dark-skinned" male, who was taller than six feet, and "really thick." The robber was wearing a white mask, white gloves, and a long-sleeved sweater. The robber wielded a silver and black gun. Aguirre testified that appellant was similar in size to the robber.

Police Officer Jerome Divinity and his partner were in the area when they were informed of the robbery by two employees of McDonald's restaurant. After confirming that the robber had fled the restaurant, the officers were told by an eyewitness that the robber had run "westbound on 101st Street." The officers traveled in that direction and saw an African-American male, wearing a white-

hooded sweatshirt. The suspect was large, at least six feet, two inches tall, and walked with a “considerable limp.” Officer Divinity saw the suspect run between two houses, and then lost sight of him. Despite establishing a perimeter search, the officers could not find the suspect.

Detective Patricia Batts responded to the report of the robbery. She was directed by an officer with the K-9 search unit to several crawlspaces in the rear of a nearby apartment complex where money, gloves, and a handgun had been found. The gloves were latex and off-white in color. The gun was a semiautomatic handgun with four bullets in the attached magazine clip. A total of \$413.30 was recovered. Detective Batts also was contacted by a nearby resident who told her that a gray doo-rag and a mask, made from a t-shirt with eyeholes cut in it, had been found in the resident’s backyard. After the items were secured, Detective Batts handed over all of the items to Detective Alejandro Garcia.

Detectives Garcia and his partner, Sonny Patsenhann, were also assigned to the robbery. Detective Patsenhann booked the items from Detective Batts into evidence. The detectives also spoke with Tucker and Hawley, retrieved a copy of the surveillance videos from the restaurant, and reviewed the videos.

Kimberle Swobodzinski, an identification technician with the Gardena Police Department, testified that on February 5, 2009, with appellant’s consent, she collected buccal or cheek swabs from appellant while he was at the Gardena jail. On February 10, 2009, Detective Garcia picked up these buccal swabs because he wanted DNA extracted from them to be compared to DNA extracted from the evidence recovered by Detective Batts. Detective Garcia also saw appellant at the jail on February 6, 2009. That day, appellant was favoring his right knee and had a limp.

Meiling Cabral, a criminalist with the Los Angeles Police Department, testified she swabbed the recovered gun, its magazine, the doo-rag, mask, and gloves for any potential biological material. The swabs were placed in separate paper bindles and envelopes. The envelopes were placed into plastic baggies, and all of the baggies were placed into a plastic container. Cabral sent the container to Bode Technology for DNA analysis. Later, she sent the buccal swabs from appellant to Bode Technology for DNA analysis as a reference sample.

Bart Naugle, formerly a DNA analyst with Bode Technology, testified he received the plastic container and analyzed the evidence container therein. On February 19, 2009, Naugle received appellant's reference sample. Another employee of Bode Technology assisted Naugle by extracting the DNA from the reference sample, and Naugle conducted the actual analysis and wrote the report.

Naugle concluded that appellant's DNA did not match that of the major contributor of DNA on the gun. Naugle could not exclude appellant from the minor contributors of DNA on the gun. Appellant's DNA also did not match that of the major contributor on the gun's magazine. Appellant's DNA, however, matched that of the major contributor of DNA on the doo-rag, mask, and gloves. Naugle concluded with scientific certainty that appellant's DNA was on the mask, gloves, and doo-rag.

2. Gardena McDonald's Restaurant Robbery

On January 23, 2009, at around 9:30 a.m., two men robbed a McDonald's restaurant located in Gardena. David Castillo, the shift manager, testified that he was at the drive-thru area when he heard an employee in the front of the restaurant scream. He went to the front to investigate and saw two men, one of whom was brandishing a gun. Castillo realized that the men wanted to rob the restaurant so he went to a cash register and began getting the \$20 bills. The man who was

brandishing a gun stated, “I want everything.” Castillo took out the cash box from the register and left it on the counter. The two men grabbed all of the money and then left. The surveillance cameras at a nearby El Pollo Loco restaurant recorded two people running from the McDonald’s restaurant.

Castillo testified both men wore black pants and black sweaters. The unarmed man was wearing a mask and blue jeans. He did not remember telling a police officer that the taller, bigger man was wearing a brown sweatshirt and black gloves, and holding a chrome gun. Castillo identified appellant from a photographic six-pack.

Margarita Guevara, an employee working at the time of the robbery, testified that the man brandishing the gun was tall and somewhat fat. She also said that he had on a navy blue or black sweatshirt. She never saw the man’s face, and was unable to identify either of the robbers from the photographic six-pack.

3. Baskin Robbins Robbery

On January 25, 2009, at around 6:30 p.m., a man wearing a ski mask and brandishing a gun robbed a Baskin Robbins in Gardena. A video recording of the robbery was played for the jury.

Asghar Ali, the store manager, testified the robber was a Black male, about six feet tall, heavysset, wearing a green ski mask with holes cut out for the eyes and mouth, a black jacket, trousers, and a dark blue hoodie. The robber was wielding a black gun. Timothy Pasiliao, an employee, described the robber as a tall and big African-American male, wearing a ski mask and hoodie. He testified that appellant matched the robber in size.

4. J&M Mobile Tech Robbery

On January 27, 2009, at around 7:00 p.m., an African-American male robbed the J&M Mobile Technology cellular phone store in Gardena. The robber

entered the store and pulled a mask down over his face before telling Jorge Morales, “This is a robbery.” Mildred Haddock, Morales’s wife and co-owner, came from the back of the store when she heard the robber. She testified that the robber demanded several types of smart phones, but she told him they had only one of the requested phones (a G1 cell phone), worth about \$450. After she gave him the phone, the robber asked for money, and Haddock told him that business was slow and she did not have any. After hearing the store’s door ring to signal it being opened, the robber left, got in a car, and drove away. The robbery was recorded on the store’s surveillance cameras.

Haddock described the robber as a tall man, about six feet three inches, and close to 300 pounds. He had a smooth jaw line with no facial hair and a big nose. Haddock also said that the robber was wearing a mask with holes cut out for his eyes and mouth. He was wielding a black gun. Haddock could not see the robber’s face because he was wearing a mask. Nevertheless, she identified appellant as the robber from a six-pack photographic lineup, based on “the round shape of the face.” Haddock testified that appellant matched the size and shape of the robber. Haddock also described the getaway vehicle as a small black car that had an advertisement that read “Reliance” in red letters instead of a license plate. Haddock identified the car from a photograph.

Morales was unable to identify appellant as the robber from the photographic six-pack, but identified appellant at trial. He explained it was different seeing someone in person than in a photograph.

Detective Coates testified that she reviewed the surveillance videos from El Pollo Loco, Baskin Robbins, and J&M Mobile Tech. She noticed that one individual -- “a very large, heavier set male Black wearing a very distinctive-type jacket” -- appeared in each video. She also noted that in the videos from Baskin

Robbins and J&M Mobile Tech, this individual was wearing the same type of shoes.

After some investigation, appellant was identified as the suspect in the robberies. Detective Coates went to appellant's home address, and noticed a vehicle parked in front of the residence. The vehicle matched the description of the one involved in the J&M Mobile Tech robbery. It had tinted windows, a rear spoiler, and chrome wheels. Detective Coates had Haddock identify the vehicle from a photograph. After the identification, Detective Luis Contreras began surveillance on appellant January 29, 2009. During the surveillance, Detective Contreras witnessed appellant driving a "dark colored, Dodge Intrepid with license paper plates with the word 'Reliance' in red lettering with a white background." Detective Contreras did not see appellant limping. He ended the surveillance January 31, 2009.

5. Jaayyle's Party Supply Store Robbery

On February 5, 2009, at around 1:25 p.m., Cuong Le, a convicted burglar, was working as a manager at his sister's manicure shop located near Jaayyle's Party Supply Store (Jaayyle's) in Gardena. He was smoking a cigarette and drinking some coffee in front of the manicure shop when he saw an African-American male walking towards him. The man was about six feet tall, stocky, big, and looked like he weighed more than 180 pounds. The man was wearing a light gray sweatshirt, sweatpants, white running shoes, and a black bandana or beanie around the forehead. The man put both hands in his sweatshirt pockets, stopped in front of Jaayyle's, and then went in. Le had seen a similar looking man drive by in a black car about 10 minutes earlier.

Juan Reyes, the owner of Jaayyle's, testified that a masked man brandishing a handgun took about \$80 to \$100 before leaving. His wife, Angeles Soria, was

working in the front of the store when the masked man entered. Reyes was initially in the back of the store, but walked to the front when he heard the store being robbed. According to Reyes, the masked man was about six feet tall, fat, and wearing gray pants, a gray sweatshirt, a white t-shirt with two eyeholes over his face, and a black doo-rag on his head. Reyes then called 911 and exited from the rear of the store. He saw the man walking away.

Le saw the masked man exit Jaayyle's. The man was wearing a mask with eyeholes fashioned out of a white t-shirt and had a hood over his head. His hand tucked a black weapon into his waistband. The masked man walked directly to Le, told Le, "Don't say anything, man," and then walked away. Le saw the man reach up to his face, perhaps to remove his mask, and then bring his hand back down. Le saw the man bump into Ezequiel Hernandez, the manager of a nearby payday loan store. The man resumed walking away, and Le told Hernandez he believed the man had robbed Jaayyle's. Le then walked around the area and saw a black car with tinted windows. The car was similar to the black car he had seen earlier.

Hernandez testified the man was about five feet, eleven inches tall, "hefty," and wearing a gray sweater and "some kind of knit cap." Reyes testified appellant was the same size as the man he had seen. He identified appellant at the time of trial and at the preliminary hearing.

Officer Evan Jackson was on field training when he received a call about the Jaayyle's robbery. He responded to a call with his training officer, Emily Colon, and arrived at the store. Officer Jackson spoke with Hernandez, Le, and Soria. They described the black semiautomatic handgun that the robber had used. All of the witnesses said that the robber was about six feet tall, and weighed approximately 250 to 300 pounds. Soria said that the robber was wearing a black

sweatshirt. One witness said the robber was wearing a doo-rag; another that the robber was wearing a beanie.

Officer Jackson provided a description of the robber over a police dispatch. Detective Contreras, who previously had appellant under surveillance, heard the radio broadcast regarding the robbery. The suspect's description was similar to or matched appellant's. Officer Contreras and his fellow officers then detained appellant in his Dodge Intrepid car. Appellant was wearing a t-shirt that was missing a sleeve. He was six feet, five inches tall, 260 pounds, and 26 years old.

Detective Coates testified that she was present when the Dodge Intrepid was searched. Inside the car was a black case and a black purse. The case held a G1 cell phone and appellant's driver's license. The purse had \$368 in cash and another G1 cell phone. Detective Coates also viewed a photograph of shoes worn by appellant when he was detained. According to Detective Coates, the shoes were very similar to the ones worn by the robber seen in the surveillance videos from the Baskin Robbins and J&M Mobile Tech robberies. She admitted, however, that she could not say that they were the same shoes.

After appellant was detained, Detective Coates also participated in a search of appellant's residence, pursuant to a search warrant. At the residence, officers found a small laundry basket containing a pair of men's sweatpants, two t-shirt sleeves, one of which was white with holes cut out of it, a small silver cell phone, and dark blue gloves. The white t-shirt sleeve with the eyeholes appeared to be the same color and type of material as the t-shirt appellant was wearing at the time of his arrest. Officers also found a duffel bag containing a box for a G1 cell phone. The box for the G1 phone had the same serial number as the G1 phone found in the purse in the Dodge Intrepid. Finally, the officers found a pair of men's white tennis shoes, a .380 semiautomatic handgun, a rifle, and a shotgun.

Officers Colon and Jackson transported Hernandez, Le, and Soria to, and from, the place where appellant was being held for a field showup. Detective Brian Messina conducted the actual field showup. Hernandez identified appellant as the robber. He stated that he was “a hundred percent sure that it was him. The only discrepancy was that the clothing that the suspect was wearing looked darker because it was wet.” Le could not recognize appellant’s face as the face of the man he saw exiting Jaayyle’s. However, he said appellant was the same height and weight as the robber and had on the same clothes, although the clothing was darker because it was wet. Le also identified appellant’s car as the one he saw at the scene of the robbery. Soria was unable to identify appellant at the field showup. Officer Colon testified that Soria told her just after the field showup that appellant matched the robber’s physical attributes.

B. *The Defense Case*

Appellant presented an alibi defense, based upon the testimony of his sister and his wife. Appellant also challenged his identification as the robber in the Jaayyle’s robbery, based upon a description provided by Officer Jackson over the dispatch that did not exactly resemble him. Officer Jackson admitted, however, that he provided this description after speaking with Soria, but before speaking with all of the other witnesses, such as Hernandez and Le. Appellant also challenged the accuracy of the DNA analysis, arguing that the samples could have been contaminated because of certain stains on the envelopes.

DISCUSSION

Appellant raises four issues on appeal. He contends (1) his confrontation clause rights were violated when a forensic analyst was not called as a witness at trial, (2) the trial court erred in modifying a jury instruction on the crime of robbery, and then giving the modified instruction, (3) the court abused its

discretion in denying a continuance on his motion for a new trial, and (4) the court failed to make an informed sentencing choice because it erroneously believed the upper term was required on the conviction for assault with a firearm. We address each contention in turn.

A. *Confrontation Clause and Forensic Analysts*

Appellant first contends the admission of the DNA analysis of his buccal swabs violated his rights under the Sixth Amendment's confrontation clause of the federal Constitution, because the analyst who extracted the DNA from the buccal swabs did not testify at his trial. We disagree.

Although the People contend appellant has forfeited his claim by failing to timely object to Naugle's trial testimony, we need not decide whether it would have been futile for appellant to object, because we conclude that his confrontation clause claim is without merit. In *Bullcoming v. New Mexico* (2011) __ U.S. __ [131 S. Ct. 2705], the court held that the federal confrontation clause does not permit the prosecution to introduce "a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification." (*Bullcoming v. New Mexico*, *supra*, 131 S.Ct. at p. 2713.) This case is factually distinguishable because here, the prosecution did not introduce a forensic laboratory report containing a testimonial certification by the other analyst working for Bode Technology. Instead, the prosecution introduced the report prepared by Naugle, who conducted the analysis and testified at trial. Naugle testified that he personally performed the DNA analysis and prepared the report. Thus, appellant was not denied his right to confront the forensic analyst who prepared the DNA

report on his buccal swabs because Naugle testified at trial. Accordingly, we reject appellant's confrontation clause claim.

B. *CALCRIM No. 1600, Instruction on Robbery*

Next, appellant contends that the trial court prejudicially erred when it modified CALCRIM No. 1600 to include the holding in *People v. Scott* (2009) 45 Cal.4th 743 (*Scott*), and thereafter instructed the jury with the modified instruction. Appellant contends (1) the modified instruction was a retroactive application of a new interpretation of the robbery statute, and (2) the modified instruction impermissibly removed the possession element of the crime of robbery from the jury's consideration. We disagree.

The crime of robbery requires "the felonious taking of personal property in the possession of another, from his person or immediate presence." (§ 211.) In this case, the trial court modified CALCRIM No. 1600 on the issue of possession as follows:

"A (store / or business) employee of the McDonald's in Los Angeles [*sic*], the McDonald's in Gardena, Baskin Robbins, JM Mobile Tech [*sic*], and Jaayyles Party Supply Store who is on duty has possession of the (store / or business) owner's property."

Appellant challenges this jury instruction, but concedes that it is derived from *Scott, supra*, 45 Cal.4th at page 757.

In *Scott*, the court concluded that the legal principle set forth in *People v. Jones* (2000) 82 Cal.App.4th 485, 490, that "California follows the long-standing rule that the employees of a business constructively possess the business owner's property during a robbery" was correct. (*Scott, supra*, 45 Cal.4th at p. 752.) The court noted that a "long line of cases" supported this principle. (*Id.* at p. 753.) The court reaffirmed "[t]he conclusion that employees have constructive possession of their employer's property when they are present during a robbery." (*Ibid.*) Thus,

this holding was not a new interpretation of the robbery statute, but a reaffirmation of an interpretation of a legal principle that existed as early as the year 2000, prior to appellant's commission of his crimes. Thus, the trial court did not err in considering *Scott* when it modified the jury instruction on the crime of robbery.

Similarly, the trial court did not err when it instructed the jury with the modified version of CALCRIM No. 1600. *Scott* has not been overruled, and thus, it is binding on the trial court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The trial court did not err when it modified CALCRIM No. 1600 to include a correct statement of law on an issue presented to the jury. Here, the factual issue that the jury had to determine was whether there were employees on duty during the robberies. Thus, the possession element of the crime of robbery was not removed from the jury's deliberations. Accordingly, there was no error.

C. *Motion for a New Trial and Continuances*

Appellant further contends that the trial court abused its discretion by failing to grant him a continuance so he could prepare a motion for a new trial. We disagree.

Because the reason appellant requested a continuance was to better represent himself, we must first consider whether appellant timely moved for self-representation. "Much as a request to represent oneself at trial must be made a reasonable time before trial commences, the request for self-representation at sentencing must be made within a reasonable time prior to commencement of the sentencing hearing. [Citation.]" (*People v. Miller* (2007) 153 Cal.App.4th 1015, 1024.) Here, appellant sought to represent himself on the date of the sentencing hearing. The motion was thus untimely.

"When a motion for self-representation is not made in a timely fashion . . . , self-representation no longer is a matter of right but is subject to the trial court's

discretion.’ [Citation.]” (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.) “When a trial court exercises its discretion to deny a motion for self-representation on the grounds it is untimely, a reviewing court must give ‘considerable weight’ to the court’s exercise of discretion and must examine the total circumstances confronting the court when the decision is made. [Citation.]” (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397-1398.)

Here, the sentencing hearing had been continued four times. Appellant has not explained why he did not request self-representation during this lengthy period, nor has he indicated on appeal what his motion for a new trial would have included. On this record, we conclude the trial court did not abuse its discretion in denying appellant’s request for self-representation as untimely.

As the motion for self-representation was properly denied, there was no reason for a continuance. Accordingly, the trial court did not abuse its discretion in denying appellant’s request. (*People v. Alexander* (2010) 49 Cal.4th 846, 934 [trial court has broad discretion to determine whether good cause exists to grant continuance].)

D. *Sentencing*

Finally, appellant contends the trial court erred in sentencing him to the upper term on the conviction for assault with a semi-automatic firearm in violation of section 245, subdivision (b). He contends the trial court improperly relied upon the prosecution’s sentencing memorandum that erroneously asserted that under sections 667, subdivision (e), the court was required to select the upper term as part of calculating the minimum sentence for the felony assault conviction. The People disagree and contend the trial court exercised its discretion in choosing the upper term to calculate the sentence. After reviewing the record, we agree with the People.

Under section 667, subdivision (e)(2)(A), when a defendant has been convicted of two or more serious or violent felonies,

“the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

“(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.

“(ii) Imprisonment in the state prison for 25 years.

“(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction”

In *People v. Keelen* (1998) 62 Cal.App.4th 813, the court held that a trial court has discretion when calculating the minimum term under option (i) to use the lower, middle, or upper term for the current felony conviction. (*Id.* at p. 815.)

Here, the People’s sentencing memorandum stated that “[d]efendant must be sentenced to the highest minimum term on the mandatory life sentences.” It further stated that the three applicable options for the felony assault conviction were: “(i) 27 years”; “(ii) 25 years”; and “(iii) 18 years.” The memorandum then stated that “[s]ince the greatest minimum term as defined by statute for [the felony assault conviction] is 27 years, the Defendant is subject[] to 27 years to life on that count.” In parentheses immediately following this statement, the People stated: “In the case at bar, the People believe the high term would be appropriate based on the host of aggravating factors discussed later.”

During the sentencing hearing, the trial court stated, “I have to sentence you to a sentence that seems like a huge piling-on kind of sentence, but that’s what the law allows and is required under these circumstances when you are a third-striker.” The court then found that there were “multiple aggravating factors.” When the

court imposed the sentence, it stated, “So with regard to . . . the violation of section 245(b)(3), the court will impose a 27-year-to-life sentence. That’s 9 years which would be the high term times 3 for 27 years.”

On this record, we conclude the trial court made an informed choice when it sentenced appellant on the felony assault conviction. The People’s sentencing memorandum did not say the trial court was *required* to select the upper term on the felony assault conviction when calculating the minimum term under the first option. Rather, the memorandum explained that the sentencing scheme required the trial court to impose the greatest minimum sentence as determined under the three options. The memorandum then stated that the high term “would be appropriate” on the felony assault conviction because of the aggravating factors in the case. During sentencing, the trial court did not state that it had no discretion to choose the lower or middle term to calculate the minimum sentence. Instead, the court found there were multiple aggravating factors and selected the high term for the felony assault conviction. Thus, we conclude that the court exercised its discretion to use the upper term in calculating the greatest minimum term for the felony assault conviction under section 667, subdivision (e)(2)(A). Accordingly, there was no sentencing error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.